IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	Case I.D. 9911016309
	)	
MICHAEL JONES,	)	
Defendant.	)	

Submitted: March 31, 2005
Decided: April 10, 2005

ON DEFENDANT'S
MOTION FOR REARGUMENT
DENIED

ORDER

Stephen M. Walther, Esquire, Deputy Attorney General, and John A. Barber, Esquire, Deputy Attorneys General, State of Delaware, Wilmington, Delaware, Attorneys for the State.

Kevin J. O'Connell, Esquire, New Castle County, State of Delaware, and Jerome M. Capone, Esquire, Wilmington, Delaware, Attorneys for Defendant.

ABLEMAN, JUDGE

Defendant, convicted of three counts of capital murder and sundry related charges by a Superior Court jury, moved to disqualify the presiding judge and for a new trial. The sole ground for the Motions is an allegedly inappropriate out-of-court conversation between the judge and her husband that was overheard by one of defense counsel's other clients. Not only are the accusations astoundingly libelous, the motions do not state a single in-court action by the trial judge that would call the verdict, which came from a jury, into question. Defendant's Motions For Disqualification and For A New Trial are therefore **DENIED**.

I. *Facts*

A. The Murders

Michael Jones is a drug-dealer and part-time assassin who murdered two people and maimed a third in a November 21, 1999 shooting spree, when he was seventeen years old. One of the people he murdered was a young mother, Maneeka Plant, who got in the way of his drug-related robbery, while she begged, "please don't kill my baby." During the penalty phase, the State also proved by a preponderance of the evidence that Jones killed a third person in Hartford, Connecticut. Jones randomly selected that victim, Michael Patterson, for death because he happened to be walking in a neighborhood controlled by a gang that was a rival to Jones' own. Jones emptied a machine gun clip into Patterson's body while standing on a well-lit, busy street corner in the presence of numerous

witnesses.

B. Defense Counsel's Incompetence and Misconduct During Trial

Given that evidence, the jury somewhat unsurprisingly recommended the death penalty by a vote of eleven to one. Their decision was made much easier by the fact that one of Jones' attorneys, Kevin J. O'Connell, seriously bungled the presentation of mitigating evidence during the penalty phase. Before expounding on Mr. O'Connell's behavior, however, it should be clear that a member of the Court's staff explained to him the true facts at issue in these filings, warned him that the consequences of unfoundedly subjecting the judiciary to disrepute would be unpleasant, and gave him a chance to withdraw these motions so as to avoid public criticism. He refused, and left the Court no choice but to detail his abysmal performance in full.

1. *Mr. O'Connell ensures that Jones is tried by a death-qualified jury*

The case began last summer with a Motion To Preclude The State From Seeking Death Penalty, due to the fact that Jones was a juvenile when he committed these murders. The United States Supreme Court had just granted *certiorari* in *Roper v. Simmons*[1], the case that would ultimately hold that the juvenile death penalty violates the Cruel and Unusual Punishments Clause of the Eighth Amendment. The Court granted the defense a hearing, in which the expert

[1] 2005 WL 464890 (not yet published in Supreme Court Reporter at time of this opinion).

testimony of Dr. Ruben Gur was offered. Dr. Gur is one of the world's foremost experts on brain development, and testified, in essence, that juveniles are less criminally culpable than adults because the area of their brains controlling foresight, goal setting, and ability to plan are not yet fully developed. The logical inference to be drawn from this opinion is that juveniles are never "the worst of the worst" murderers, and therefore never deserve the death penalty.

At this hearing, the Court expressed skepticism as to whether it could disregard United States Supreme Court precedent that held the juvenile death penalty to be constitutional. The Court expressed willingness to delay the trial until after a decision in *Simmons*, so that the State could avoid the expense of preparing for a penalty phase that might later prove to be meaningless, and so Jones could avoid being tried by a death qualified jury. Mr. O'Connell rejected this course, insisting that the Court rule immediately and adopt the reasoning of the Missouri Supreme Court in *Simmons*.

At the time, I assumed that the impetus for this tactically questionable decision was Jones himself, but I now realize that was not the case. Instead, it appears that Mr. O'Connell views the existence of the death penalty as a personal affront, and is on a crusade to eradicate it. Various statements by Mr. O'Connell during these proceedings indicated that he considered this case a good one to test the juvenile death penalty, and was loath to deprive himself of the opportunity to

argue it before the Delaware Supreme Court in the event that the *Simmons* court ruled the opposite way. This focus was utterly contrary to what Mr. O'Connell acknowledged to be the best interests of his client, i.e. to avoid a trial by a death qualified jury.[2] The result of Mr. O'Connell's decision was the Court's August 31, 2004 opinion upholding the juvenile death penalty on *stare decisis* grounds, guaranteeing that the jury determining Jones' guilt would be death qualified.

2. *Mr. O'Connell delays seeking discovery of penalty phase evidence*

The trial proceeded as scheduled, with co-counsel Jerome M. Capone doing, with only one exception detailed *post*, a commendable job defending the guilt phase. However, his efforts were not enough to rebut the mountain of evidence implicating Jones, and the jury unanimously convicted of all charges on January 27, 2005.

That same day, when the necessity of a penalty phase changed from likely to certain, Mr. O'Connell filed a motion demanding full Rule 16 discovery regarding the Hartford murder. The timing of the motion was inexplicable because the State had placed Mr. O'Connell on notice that evidence of the Hartford murder would be

[2] There is an anecdotal belief widely held in the defense bar that the death qualification process results in juries of "law and order" types who are less than normally concerned with the reasonable doubt standard, and are therefore more likely to convict. To my knowledge, there is no case law endorsing this assertion, nor a single holding that trial by a death qualified jury is prejudicial *per se*. The fact that the defendant moved for a new trial on guilt even though the complained of conduct occurred during the penalty phase shows that Mr. O'Connell blames Jones' conviction not on the evidence presented, or on his own misconduct, but solely on the fact that the jury was death qualified. As will be shown, that simply is not accurate.

presented in the penalty phase over a year earlier. A competent attorney would have conducted an investigation regarding the Hartford murder to prepare to rebut the State's evidence, or at least submitted discovery requests for the written evidence on which the State was relying.[3] Instead, Mr. O'Connell sat on the issue for thirteen months, and then attempted to use it on the day the penalty hearing was to begin as grounds to delay the proceedings. The request was denied as untimely and legally unsupported, leaving Mr. O'Connell to "fly blind" regarding the Hartford evidence.

3. *Mr. O'Connell fails to secure Jones' mitigating witnesses, lies to the Court about their availability, and behaves contemptuously*.

Regrettably, Mr. O'Connell's performance did not improve during the penalty hearing. After the State had presented its case, Mr. O'Connell requested a full day recess because he had not bothered to make any witnesses available to testify the following day. When asked why the defendant's family could not testify, Mr. O'Connell told the Court that he had already rented them a car and hotel room for two days hence and that it was too late to change the reservation. This was the lamest attempt to conceal lack of preparation that the Court had ever heard. Rental car and hotel reservations are easily altered, and, supposing this one could not be, the additional cost would have been negligible, and that pittance

[3] If asked, the Court would have approved an expense request for an investigator, as it had done for other aspects of the case, or heard argument on the discovery question. It was also highly

could have been expensed to the State.

When the Court refused Mr. O'Connell's request for a recess, he launched into a heated tirade that accused the Court of favoring the prosecution. The crux of this tantrum was Mr. O'Connell's belief that the Court had ended the day early on several occasions to accommodate the State's witnesses, so there was no reason not to take a day off to cover his negligence. In reviewing its notes, the Court found only a single instance during the State's case where it recessed early by more than a few minutes. On that day, the Court recessed at 2:00 pm instead of 5:00 pm because the State's next witness was a medical expert who could not be brought in early. Conversely, the witnesses Mr. O'Connell supposedly feared inconveniencing were Jones' mother and high-school-age sister, who were to testify that their undying love for Jones meant that the jury should not recommend the death penalty.[4]

4. *Mr. Capone behaves disrespectfully*

This instance of Mr. O'Connell's contemptuous behavior was particularly upsetting because, in fact, the only significant avoidable delay in the proceedings

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probable that the State would have shared its files with Defendant, though it was not legally required to do so, as it did when Mr. O'Connell finally got around to addressing the matter.

[4] The argument that the family loved Jones but would not incur a minor reimbursable expense and the slight inconvenience of driving from Hartford a day early to save him from the death penalty was totally absurd, and proven to be so when the family did in fact testify the next day after the Court ordered Mr. O'Connell to request that they do so. It is overtly obvious that Mr. O'Connell wanted an extra day to prepare his case.

had come at the request of Defense counsel.[5] The Court had granted Mr. Capone's request for a two-day recess during the guilt phase so that he could try an unrelated civil matter. To my knowledge, it was unprecedented to grant such a delay in a capital case because of the ever-present danger that a juror could become indisposed or stumble upon media coverage of the trial. My decision to give Mr. Capone a break, the only ground for which was his desire to collect a contingency fee, astounded many of my judicial colleagues, who thought that, given the importance of Jones' case, the defense was out of line to even make the request.

This accommodation was not met with the thanks it deserved. Instead, during an in-court scheduling discussion, Mr. Capone demanded that the Court extend the recess to a third day because the expert witness in his civil trial had a conflict during the two days that had been reserved. Mr. Capone first attempted to mislead the Court, claiming that he had always stated that the civil trial would last three days and that his request to recess for that amount of time had already been approved. This argument collapsed when Mr. Capone was shown the schedule given to the jurors at the case's inception, clearly delineating a two-day recess. When informed that the Court would not further inconvenience sixteen jurors that had already pledged over two months of their time, and that he would be limited to

[5] An unavoidable delay occurred when, on the day the penalty hearing was to begin, Jones collapsed of a colon cyst that required emergency surgery and a ten-day in-patient recovery period. This meant that the trial extended two weeks longer than the time to which the jury had

the two-day recess he had previously requested, Mr. Capone responded with such contemptuous body language that members of the gallery, viewing him only from the back, later commented about it. When this tactic also failed, Mr. Capone followed the Court up to chambers, attempting to continue the argument *ex parte*. The Court refused to have any further discussion on the issue. One of the prosecutors in the case, fearful that Mr. Capone's concern for his civil case might subject him to later criticism in a Rule 61 Postconviction Motion, later called the Court at home to request reconsideration.

5. *Mr. O'Connell bungles the presentation of mitigating evidence*

The most unforgivable example of Mr. O'Connell's total lack of preparation during the penalty phase was the presentation of expert witness testimony from Dr. Ragland, a psychologist from the University of Pennsylvania. Dr. Ragland had given Jones a barrage of psychological tests that, the defense hoped, would show that he had a brain defect that lessened his culpability in committing the murders. It was abundantly clear that Mr. O'Connell had not prepared for the enormous holes in Dr. Ragland's testimony, nor considered what would happen to Jones' chances of avoiding the death penalty if the State, unlike the defense, had read the expert report in detail.

The State positively pilloried Dr. Ragland on cross-examination. Dr.

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originally committed, a fact Mr. O'Connell blithely ignored while demanding an additional day

Ragland admitted that the basis for his opinion that Jones suffered a brain defect was Jones' self-serving report of injuries he suffered as a child. Not only was there no independent evidence confirming these injuries, there was substantial evidence in Jones' juvenile criminal record that the events at issue did not occur as Jones had described, i.e. that Jones lied to Dr. Ragland about his medical history and the doctor did not bother to verify his statements.[6] Other factors that Dr. Ragland used to opine that Jones had a brain defect were: (1) Jones has a limited vocabulary and is embarrassed about it, and (2) Jones could not name some moderately obscure objects, such as accordions. Dr. Ragland conceded, however, that these problems were likely explained by the fact that Jones dropped out of school in the ninth grade to become a full-time drug dealer.

Most damaging, however, were findings that the defense had totally ignored. In administering the psychological tests, Dr. Ragland discovered that Jones is an exceptionally gifted planner. Dr. Ragland testified that Jones' scores regarding planning and ability to foresee consequences were "off the charts," and were, indeed, higher than any he had ever seen. This admission, which Dr. Ragland repeated *ad naseum*, annihilated Jones' only viable defense: that, as a juvenile, he was too young to reasonably calculate the possible outcomes of his murderous

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off.

[6] In one example, Jones told Dr. Ragland that he was knocked unconscious when a car that he had stolen overturned during a police chase. All documentation regarding this incident

rampage, and to plan accordingly. It also eliminated another proposed mitigating factor: that a sentence of life imprisonment would ensure that Jones would never again threaten society. The State used Dr. Ragland's testimony to suggest that Jones would use his exceptional gift for planning to formulate an escape, endangering corrections officers and the public at large.

The defense's total failure to prepare for Dr. Ragland's testimony was devastating. When Dr. Gur took the stand as the next defense witness, explaining the complicated science of brain development and its nexus to planning ability, the jury appeared disinterested. Their courtroom demeanor, as well as their sentencing recommendation, made it clear that the jury viewed the medical evidence as mere "psychobabble" meant to mislead them into excusing an inexcusable crime. This was despite the fact that Dr. Gur is a superb witness: engaging, charismatic, highly expert, and convincing. There simply was no way for him to salvage the train wreck that Mr. O'Connell had made of the defense case.

C. The Effect Of Mr. O'Connell's Misconduct

The Court should make clear that it does not believe that Mr. O'Connell's performance, though certainly not helpful, prejudiced Jones within the meaning of *Strickland v. Washington*.[7] The guilt phase of the trial was handled entirely by Mr.

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uniformly indicated that Jones and his cohorts bailed out of the vehicle before it collided with anything, and fled on foot in perfect health.

[7] 466 U.S. 668 (1984).

Capone who, though he had little evidence to present, energetically and adroitly cross-examined the State's witnesses in an effort to create reasonable doubt. While there was a disturbing incident in which Mr. Capone behaved poorly, putting his pocketbook before the needs of his client, it occurred outside the presence of the jury and had no discernable effect on his trying of the case. All of Mr. O'Connell's malfeasance related to the penalty phase, which was rendered utterly meaningless by the United States Supreme Court's decision to strike down the juvenile death penalty in *Simmons*.

D. Misconduct Allegations

The Court endured the bitter and recriminating exchange with Mr. O'Connell regarding the proposed recess in the penalty phase on February 14, 2005. The following day, the Court dined with her husband and a friend, who is a distinguished member of the Delaware bar. The conversation between these three people is the subject of the instant motions.

According to Mr. O'Connell, his client, Michael Lindsey, informed him that he had brought a date, Sonya Dryden, to the same restaurant that evening, and that they both overheard the Court's conversation. Mr. O'Connell submitted an affidavit from Ms. Dryden, but not Mr. Lindsey, to support the instant motions. The pertinent part of the affidavit is as follows:

> The [judge] discussed with [the friend] a case in which she was presiding as a judge. From her conversation with the [friend], I learned that she was presiding over a trial in

> which the death penalty was being decided. She mentioned a defense attorney named Kevin O'Connell. The [judge] expressed anger at Kevin O'Connell, stating in substance, that she could not believe Kevin O'Connell, that he "really pissed me off," that she was mad, that she was mad driving home, that she remained mad at home and that she went to sleep mad. The [judge] mentioned that she was angry due to something that occurred at "sidebar" with this defense attorney. She used profanity when referring to Mr. O'Connell. The [judge] then said that she did not care what anybody said. She would get the last word and that the man on trial would get the death penalty. She appeared to be tearful.

Because this conversation, the key details of which are unfortunately untrue, occurred before the defense had made most of its inadequate mitigation presentation during the penalty phase, Mr. O'Connell believes that the Court was so biased against Jones that the entire trial is tainted by structural error. The defense has therefore moved this Judge to disqualify herself from further proceedings in Jones' case, presumably after granting Jones a new trial.

II. *Standard of Review*

Judges consider recusal motions under a two-part test: (1) does the judge subjectively believe that she is free of bias, and (2) is there an objective appearance of bias such that the judge's impartiality would be questioned by a reasonable observer.[8] Because the only reason cited for the Motion For New Trial is the Court's alleged bias, both Motions can be disposed of with the recusal test.

III. *Discussion*

A. Actual Bias

The Court is not biased against the defendant within the meaning of Canon

3, nor was it predisposed to give Jones the death penalty if he were convicted. In fact, as the remainder of this opinion will show, the Court was highly *disinclined* to issue a death sentence in this case because of a personal belief that the juvenile death penalty is morally wrong. The fact that the Court put that personal feeling aside, and strove to uphold the law by allowing the State to pursue the death penalty, does not indicate bias, but rather its opposite.

The Court also does not bear actual prejudice against Defendant's attorneys such that the constitutional impartial judiciary requirement could be called into question. My problems with the defense attorneys, as explained further below, were purely professional, and were based entirely upon the in-court events described *ante*. Prong one of the recusal test therefore is not at issue.

B. Appearance of Prejudice

The prejudice allegation that Defendant, or, more correctly, his lawyers, have made relates entirely to the overheard conversation detailed *Supra Part I.D.* There are two issues in the conversation that may indicate an appearance of bias requiring recusal: (1) the Court's expression of anger at Mr. O'Connell, and (2) the Court's alleged decision to sentence Jones to death before hearing his mitigating evidence. The first ground fails as a matter of law, the second as a matter of fact.

[8] Delaware Judge's Code of Judicial Conduct, Cannon 3C; *State v. Barnett*, 1997 WL 358019 (Del. Super.).

1. *The Judicial Code of Conduct does not require judges to ignore or celebrate bad lawyering while outside the presence of the jury*

Defendant's first argument, by far the weaker, is that the Court exhibited "extreme animosity toward [Mr.] O'Connell," stating that "he really pissed me off," and that the Court remained angry over Mr. O'Connell's behavior for some time after the events of February 14, 2005. This report is accurate, both in the abstract and in the fact that I expressed that sentiment during the overheard conversation.

My "animosity" towards Mr. O'Connell, which would be more accurately termed disappointment, is not a reasonable basis for assuming I was biased against his client. The aforementioned instances of total failure to prepare, belligerence, and disrespect to the Court at sidebar provide a more than reasonable basis for the Court to have become dissatisfied with the way Mr. O'Connell tried this case. That feeling, however, sprang from the Court's judicial desire to ensure that Jones received a fair penalty hearing. I also had a strong personal desire to avoid a recommendation from the jury so strong that failure to issue a death sentence would appear to substitute my opinion of the juvenile death penalty for that of the law of Delaware and the conscience of the community. I did not intend to use my disappointment with Mr. O'Connell as an excuse to impose the death penalty regardless of Jones' mitigating evidence. Instead, I was dissatisfied with Mr. O'Connell because his poor performance made it practically inevitable that the jury

would strongly vote death, a recommendation that I would have probably had to follow regardless of my personal convictions.

This case reveals a truism of legal practice that every lawyer should already know: judges do not appreciate attorneys being unprepared, and often say so outside the courtroom. Judges, like everyone else, have spouses and siblings and friends. Judges, like everyone else, are frequently asked, "So how was your day?" over dinner, and, like everyone else, answer that question candidly. Defendant has not cited, nor am I aware of, any authority that would prevent a judge from telling her husband, "An attorney has so botched the death penalty case that I am trying that I am going to be stuck with a ten-two jury vote to execute a juvenile." The reason is obvious; it is simply too much to ask that a judge not utter a word to anyone about a case that may extend, like this one, for months, and to completely abstain from the support of family and friends when faced with difficult legal and moral decisions on matters of life and death. The fact that Mr. O'Connell may be offended by these judicial asides is entirely his own fault, and is not a basis for recusal.

2. *The Court never suggested predisposition toward a death sentence*

Far more troubling is Defendant's allegation that the Court said it was going to issue a death sentence in this case regardless of any mitigating evidence. That is simply not true. As indicated throughout this opinion, this Court finds the juvenile

death penalty morally objectionable, and would have found it very difficult to follow the jury's death recommendation. In fact, the Court was ardently following the *Simmons* case in the hope that the United States Supreme Court would take the decision out of my hands, as ultimately occurred.[9]

The question, then, is whether this Court's emphatic denial of making the statement attributed to me in Defendant's motions is sufficient to dispel the appearance of prejudice those motions may have created. I believe that it is. I am far more familiar with the Judicial Code of Conduct than is Mr. O'Connell, and, if this case is any indication, far more conscientious of the ethical duties of attorneys as well. If it could possibly be believed that I would ever make such a statement, I have wasted the 21 years that I have dedicated to public service as a judge in two of Delaware's trial courts.

From a policy perspective, this finding is absolutely necessary. Recusal must require more than throwing mud at a judge in the hope that some will stick. To endorse this sort of spurious accusation by granting a hearing or recusal would only encourage other unethical attorneys to "judge shop" by filing motions based on fabrications.

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[9] It would have been inappropriate to publicly express these personal sentiments before *Simmons*, as they may have been taken to indicate that the Court would substitute its own judgments for that of the General Assembly. The August 31, 2004 opinion upholding the juvenile death penalty in Delaware should allay any qualms on that score. Moreover, the jury's recommendation in this case was so strong that, but for *Simmons*, the Court would have felt itself

This is particularly true because the defendant has a corollary procedure available to him to pursue these sorts of allegations. The Court On The Judiciary exists for the sole purpose of correcting judicial misconduct, and is available to the defendant at any time.[10] I would welcome the chance to vindicate myself before that panel. I will not, however, bastardize the recusal process to allow the defendant to avoid the procedural requirements of that court.[11]

C. Much Ado About Nothing

What makes these Motions most insulting is that they were filed merely out of spite. *Simmons* decided once and for all that no juvenile can be executed in the United States. The penalty phase of this trial and everything that occurred during it has no legal significance whatsoever, and was, regrettably, a complete waste of time. I could not sentence the defendant to death no matter how badly I wanted to, which, as I can now reveal, was not at all. Everything of significance in this trial was therefore completed when the jury entered its guilty verdict.

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compelled to sentence Jones to death. It should also be noted that the Court's moral objection does not extend to the death penalty in general.

[10] Del. Const. Art. IV § 37.

[11] I will, however, suggest to Mr. O'Connell that he "look before he leaps" in pursuing this action any further, as he apparently failed to do before filing here. I have so far acted under the assumption that Mr. Lindsey and Ms. Dryden merely misheard my conversation. It seems equally likely, however, given the win-at-all-cost attitude displayed in other aspects of this case, that Mr. O'Connell encouraged their "misunderstanding" of the discussion. I make this observation not to gild the lily, but because my conversation was so long, and my position in it so clearly stated, that I do not know how Ms. Dryden could have reached the conclusion indicated in her affidavit. In any event, the likely witnesses testifying to my opinion of the juvenile death penalty in such an action would be every Superior Court judge (except Judge

These motions do not point out a single questionable ruling or even the slightest scintilla of prejudice by the Court during the guilt phase. That is because there was none. Given its length, this was a surprisingly clean case that did not require significant evidentiary rulings or spark many objections. Frankly, other than the death penalty related motions that ultimately became irrelevant, the Court did little in this case but sit back and allow the jury to reach its verdict.

It is therefore puzzling that Defendant would demand a new trial on guilt because of an out-of-court conversation during the penalty phase, until one realizes that he has nothing else to appeal. A decent attorney would have realized this fact, filed a motion to withdraw under Supreme Court Rule 26(c), and been grateful that, as he had hoped and argued for more than a year, his client will not receive the death penalty even though he murdered two people. Mr. O'Connell, however, wants the defendant to escape punishment altogether, and is willing to throw aside all ethical considerations to achieve that end. That is not zealous representation; it is a form of blind fanaticism unbecoming of a Delaware attorney.

Gebelein, who has been serving the National Guard in Afghanistan), at least one Supreme Court

IV. *Conclusion*

For all these reasons, Defendant's Motion To Disqualify and Motion For A New Trial are hereby **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

cc: Kevin J. O'Connell, Esquire
Jerome M. Capone, Esquire
Stephen M. Walther, Esquire
John A. Barber, Esquire
Prothonotary

Justice, and the chair of the Judicial Nominating Committee, to name a few.